

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of

Request for Review by the  
Milwaukee Public Schools of Decisions of the  
Universal Service Administrative Company

Schools and Libraries Universal Service Support  
Mechanism

CC Docket No. 02-6

Milwaukee Public Schools

Billed Entity Number: 132882

Funding Request Numbers: 1043797, 1047686

471 Application Numbers: 361703, 380783

**REQUEST FOR REVIEW**

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**REQUEST FOR REVIEW**

The Milwaukee Public Schools (“Milwaukee”), pursuant to Section 54.719(c) of the Commission’s rules, hereby submits this Request for Review of two decisions of the Universal Service Administrative Company, Schools and Libraries Division (“USAC” or “SLD”) denying Milwaukee’s request for funding for telecommunications services for Funding Year Six (academic year 2003-2004). USAC improperly denied two of Milwaukee’s funding requests based on factually incorrect conclusions that contracts were not in place between Milwaukee and the service provider covering these telecommunications services during the relevant time periods.<sup>1</sup> With this Request for Review, Milwaukee asks the

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<sup>1</sup> Letter from USAC/SLD to James E. Davis, Milwaukee Public Schools, “Administrator’s Decision on Appeal – Funding Year 2003-2004,” Funding Request No. 1043797, 471 Application No. 361703 (dated Feb. 16, 2005) (“POTS Decision on Appeal”). Attached as Exhibit A-1; Letter from USAC/SLD to James E. Davis, Milwaukee Public Schools, Funding Request No. 1047686, 471 Application No. 380783, “Administrator’s Decision on Appeal – Funding Year 2003-2004,” (dated February 16, 2005) (“SONET Decision on Appeal”). Attached as Exhibit B-1.

Commission to overturn both of these decisions and remand to USAC with instructions to fund the requests for payment.

## **INTRODUCTION AND SUMMARY**

This Request for Review raises three issues on appeal. First, USAC's reduction of Milwaukee's POTS funding request was based on an incorrect conclusion that the contract term ran from July 1, 2003 through February 25, 2004. This conclusion is erroneous on its face, as it was based on a review of the wrong contract, is inconsistent with USAC's acceptance of the existence of a 2003 contract that superseded the prior contract, and conflicts with USAC's own prior understanding of the contract terms.

Second, USAC's denial of the SONET funding request is erroneous because it is based on a mischaracterization of the contract that Milwaukee chose to extend with SBC. USAC erroneously read the master document as one contract, rather than the memorialization of two, independent contracts – one for POTS service and another for SONET service. In addition, Milwaukee had a valid, binding agreement with SBC at the time of the filing of the Form 471 because it was exercising a renewal option, and as such, could rely on its original contract, which included the renewal option. Any requirement for a new agreement is inconsistent with *Florida Dept. of Management* and similar FCC decisions.

Finally, USAC's denials of Milwaukee's requests for both POTS and SONET service funding based on the lack of contracts at the time the Form 471's were filed should be reversed because both POTS and SONET are tariffed services for which no contract is needed.

## BACKGROUND

USAC denied two of Milwaukee's funding applications, in whole or in part, based on a misunderstanding and mischaracterization of Milwaukee's contracting decisions for local exchange telephone service (also known as "plain old telephone service" or "POTS") and Synchronous Optical Network ("SONET") telecommunications services.

**Initial Contracts.** In 1998, Milwaukee issued requests for proposal, via Form 470 filings with USAC, for POTS and SONET services. SBC Ameritech ("SBC") was the winning bidder, and Milwaukee subsequently entered into five-year contracts with SBC for POTS and SONET service, both of which are tariffed common carrier services. The original terms of the POTS and SONET contracts were from February 1999 through February 2004. While the contracts were based on the rates specified in the tariffs, the contracts provided that Milwaukee would receive specified discounts off the basic tariffed rates if it satisfied certain minimum purchase commitments. Milwaukee's SONET contract included a renewal option to extend for up to five years in one-year increments.

**New POTS Contract.** During the 2002-2003 academic year, Milwaukee decided to initiate a new contract for POTS for the period from July 1, 2003 through June 30, 2004. Milwaukee sought to enter into a contract that would provide service for the full academic year, rather than ending in February 2004, as the 1999 contract did. Consistent with Commission rules governing the competitive bidding process for the E-rate program, Milwaukee filed a Form 470, posting a request for proposals ("RFP") for POTS service on the USAC website on

January 7, 2003.<sup>2</sup> SBC was the sole bidder on the POTS contract, and after waiting the required 28 days, Milwaukee accepted SBC's bid, notifying SBC of its acceptance soon thereafter. After accepting SBC's bid Milwaukee submitted its Form 471 request for E-rate funding support for the contracted services on February 6, 2003.<sup>3</sup> On December 2, 2003, USAC denied this request based on its conclusion that no contract or legally binding agreement for POTS service existed between Milwaukee and SBC when the Form 471 was filed, as is required by USAC's procedures.<sup>4</sup>

Milwaukee filed an internal appeal of USAC's denial of its POTS funding request on January 29, 2003.<sup>5</sup> Milwaukee provided information to counter USAC's initial erroneous conclusion that there was no legally binding agreement in place when the Form 471 was filed. Milwaukee submitted a letter from the Milwaukee City Attorney's Office, which demonstrated that, under Wisconsin law regarding government contracts, there was a legally binding agreement in place between Milwaukee and SBC at the time the Form 471 was filed.<sup>6</sup> In response to this submission, USAC – in a letter dated February 16, 2005 – reversed its initial position and accepted that Milwaukee and SBC had a legally binding agreement in place at the time the Form 471 was filed.

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<sup>2</sup> Milwaukee Public Schools, Form 470 (POTS) (dated January 7, 2003). Attached as Exhibit A-2.

<sup>3</sup> Milwaukee Public Schools, Form 471 (POTS) (dated February 6, 2003). Attached as Exhibit A-3.

<sup>4</sup> Initial USAC Denial of POTS Funding Request, dated December 2, 2003. Attached as Exhibit A-4.

<sup>5</sup> Letter of Appeal, Milwaukee Public Schools from James E. Davis to USAC, dated January 29, 2003. (Appeal of USAC denial of POTS funding request). Attached as Exhibit A-5.

<sup>6</sup> Letter from Grant F. Langley and Dawn M. Boland, Office of Milwaukee City Attorney to Michelle Nate Department of Finance, Milwaukee Public Schools, dated January 27, 2003. Attached as Exhibit A-6.

Nevertheless, USAC proceeded to reduce the funding amount based on its conclusion that the contract term expired on February 25, 2004.<sup>7</sup> It is against this conclusion that Milwaukee now appeals to the Commission.

**Extended SONET Contract.** Milwaukee decided to exercise its option to extend its SONET service contract during the 2002-2003 academic year as well. Milwaukee concluded that it could exercise its option to renew its SONET contract without being required to post a new RFP via Form 470, relying on the Bureau's decision in *Florida Dept. of Management Services*, CC Docket No. 96-45, DA 99-1773, 15 FCC Rcd 6732 (Com. Car. Bur. 1999) (holding that where a school district entered into contracts that included renewal options, the district "may exercise those renewal options without any additional service requesting post"). Milwaukee decided to exercise its renewal option to extend the contract for three years, and notified SBC of this decision.

On February 6, 2003, Milwaukee submitted a Form 471 request for funding for the 2003-2004 academic year, the first year of the exercised renewal option (or year six of the original 5-year contract for SONET service).<sup>8</sup> Its description of services for the application stated that it was extending its existing contract with SBC for its SONET service by exercising its renewal option to extend for three of its five one-year extensions. In its Form 471 application Milwaukee noted that the underlying contract for its request for funding assistance was the original SONET contract, which included the renewal option clause. In a notification dated December 2, 2003, USAC denied the funding

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<sup>7</sup> POTS Decision on Appeal, *supra* note 1. Attached as Exhibit A-1.

<sup>8</sup> Milwaukee Public Schools, Form 471 (SONET), dated February 6, 2003. Attached as Exhibit B-2.

request on the ground that there was no contract or legally binding agreement in place at the time the Form 471 was filed.<sup>9</sup>

Milwaukee filed an internal appeal to USAC regarding its denial of its SONET funding request on January 24, 2004, in which Milwaukee maintained that there was a contract in place at the time the Form 471 was filed.<sup>10</sup> Milwaukee pointed to the Commission's decision in *Florida Dept. of Management Services*, DA 99-1773, holding that an applicant could exercise a renewal option without being required to repost the contract for services through the Form 470 process. Milwaukee contended that its actions were consistent with the Commission's ruling.

In its response, dated February 16, 2005, USAC again denied the SONET funding request. This time, however, the denial was based on two grounds, each leading to the conclusion that Milwaukee and SBC did not have a contract or a legally binding agreement in place at the time the Form 471 was filed. First, USAC concluded that the contract referenced in the Form 471 Application included both SONET service and POTS service, rather than simply SONET service consistent with the exercise of the renewal option in the original contract. Consequently, USAC concluded that the Milwaukee had not exercised its option on the original contract prior to its expiration on May 30, 2003. Second, USAC concluded that even if there were a contract for SONET services only, Milwaukee had not exercised its contract extension as of the Form 471

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<sup>9</sup> Initial USAC Denial of SONET Funding Request, dated December 2, 2003. Attached as Exhibit B-3.

<sup>10</sup> Letter of Appeal, Milwaukee Public Schools, from James E. Davis to USAC, dated January 24, 2003. (Appeal of USAC denial of SONET funding request). Attached as Exhibit B-4.



Application Received Date of February 6, 2003, because there was no legally binding agreement in place at the time the Form 471 was filed.<sup>11</sup> It is against these conclusions that Milwaukee now appeals to the Commission.

## ARGUMENT

### **I. USAC ERRONEOUSLY REDUCED THE FUNDING FOR POTS BECAUSE IT RELIED ON THE EXPIRATION DATE OF THE ORIGINAL 1999 CONTRACT WHICH WAS SUPERSEDED BY THE 2003 CONTRACT WITH A ONE-YEAR TERM ENDING JUNE 30, 2004**

USAC incorrectly concluded that Milwaukee's POTS service contract with SBC expired on February 25, 2004 because it reviewed the wrong contract. The five-year contract between Milwaukee and SBC was entered into on February 26, 1999, and expired five years from that date.<sup>12</sup> This contract was superseded when Milwaukee issued a new RFP in order to obtain a contract with a term extending the full length of the 2003-2004 academic year.

In its February 16, 2005 response to Milwaukee's appeal of its POTS funding denial, USAC reversed its prior position that no contract was in place at the time that Milwaukee filed the Form 471 Application. USAC stated, "Your appeal has brought forth information that your appeal should be partially approved." USAC's partial approval was based upon its concession that a contract was in place when the Form 471 was filed. However, USAC then reverted back to the 1999 contract to determine that the contract's expiration date, February 25, 2004, would mark the endpoint of E-rate funding for Milwaukee's POTS service.

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<sup>11</sup> SONET Decision on Appeal, *supra* note 1. Attached as Exhibit B-1.

<sup>12</sup> Netspan Services Agreement between Ameritech Information Systems, Inc. and Milwaukee Public Schools. Attached as Exhibit A-7.

Given that USAC accepted the existence of a new contract between Milwaukee and SBC, it necessarily also accepted that this contract superseded any previous contract for POTS service between SBC and Milwaukee, as that was the intention of the 2003 contract. *See Tennies Corp. v. Wagner Iron Works*, 98 N.W.2d 399, 401 (Wisc. 1959) (holding that “A contract complete in itself will be conclusively presumed to supersede and discharge another one made prior thereto between the same parties concerning the same subject matter, where the terms of the later are inconsistent with those of the former so that they cannot subsist together”). The 2003 contract was between the same parties, covered the same subject matter, and included inconsistent terms – the contract expiration date – which went to June 30, 2003 in the later contract. Nevertheless, USAC, in determining the funding level of the POTS funding request for a contract whose term extended from July 1, 2003 through June 30, 2004, returned to the expiration date of the superseded contract. As stated above, the contract that USAC agreed was in place at the time the Form 471 was filed would have to have been the contract that was referenced in the Form 471 Application. It is, then, completely inconsistent for USAC to have neglected the terms of the very contract whose existence it has accepted.

Moreover, USAC’s decision completely frustrates the central purpose of Milwaukee’s issuing a new RFP, which was to obtain funding for the full 2003-2004 academic year, rather than only partial funding ending in February 2004. This was the only reason that Milwaukee issued a new RFP for POTS service. The Commission should reverse USAC’s erroneous decision.

## **II. MILWAUKEE VALIDLY EXECUTED THE CONTRACT EXTENSION FOR SONET SERVICE BY EXERCISING ITS OPTION PRIOR TO FILING ITS FORM 471 APPLICATION**

USAC based its denial of Milwaukee's appeal of its denial of SONET funding on two grounds, both premised on incorrect factual conclusions. First, USAC has misunderstood and mischaracterized the SONET services contract that it reviewed upon Milwaukee's initial appeal in concluding that it included POTS service.<sup>13</sup> Second, USAC's conclusion that there was no legally binding agreement in place between Milwaukee and SBC evidencing Milwaukee's exercise of its renewal option is inconsistent with *Florida Dept. of Management* and its progeny.

### **A. The 2003 SONET Extension Did Not Include POTS Service**

USAC's conclusion that the SONET contract that Milwaukee referenced in its appeal included both SONET and POTS service is a mischaracterization of the SONET contract between Milwaukee and SBC. Because SBC is the service provider for both the SONET and POTS services, the document that USAC reviewed was a master document that Milwaukee received from SBC, which memorialized both contracts. It was not a single contract that included both services. The contract documents that refer to SONET service

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<sup>13</sup> USAC's letter contends that a Milwaukee representative wrote, in a May 12, 2003 letter, that "The district has not awarded any contracts to any of the recommended vendors." See Exhibit B-1 at 1-2. USAC improperly takes this statement out of context and mischaracterizes it. The Milwaukee representative was responding to a USAC question about conventionally signed contract documents for SONET services. No such contracts existed because, as explained above, under Wisconsin state law regarding government contracts, no separate document is necessary to establish a contract where an agency accepts a competitive bid. Moreover, no new contracts were awarded because the pre-existing contract with SBC was extended, as explained more fully in the text.

contain no mention of POTS service.<sup>14</sup> The only reference to POTS service is a page that references the total costs of POTS service.<sup>15</sup> At no point were these contracts combined as a single contract, and the SONET contract remains a separate service with a separate contract, which is merely the extension of the original contract including options to extend.

**B. Milwaukee Validly Executed the Contract Extension Prior to Filing Its Form 471 Application**

USAC's second basis for denying Milwaukee's funding request is premised upon its conclusion that there was no binding legal agreement in place at the time the Form 471 was filed. This conclusion is erroneous. The legally binding agreement upon which the Form 471 was based was the original contract, including the renewal options, between Milwaukee and SBC. USAC's conclusion suggests that Milwaukee required a new contract with SBC in order to extend its original contract. Yet this is in direct conflict with the Wireline Competition Bureau's prior decision in *Florida Dept. of Management Services*, as well as *Request for Review of the Decision of the Universal Service Administrator by Thomasville City Schools*, 17 FCC Rcd 15879, 15880 (2002). In the latter decision, the Bureau reaffirmed its decision in *Florida Dept. of Management*, stating: "Once a Form 470 has been posted on the SLD website, a school or library may sign contracts with providers that include renewal options, and the school or library subsequently may exercise those renewal options without any additional FCC Form 470 postings." In that case the Bureau denied an application for review on the basis that the applicant had entered into a new

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<sup>14</sup> Ameritech OC-48 Dedicated Ring Service ICB Agreement. Attached as Exhibit B-5.

<sup>15</sup> Annual Commitment for POTS Services. Attached as Exhibit B-6.

contract, for which a Form 470 was required, rather than having exercised a renewal option on an existing contract.

Milwaukee's original contract with SBC included a renewal option. Milwaukee exercised this renewal option when it notified SBC of its decision. Accordingly, there is no requirement of a new contract or other evidence of a binding agreement, beyond the original contract. Accordingly, Milwaukee requests that the FCC reverse USAC's determination that there was no legally binding agreement in place when the Form 471 was filed, and reverse USAC's denial of Milwaukee's request for SONET funding.

### **III. SONET AND POTS ARE TARIFFED SERVICES FOR WHICH NO CONTRACT IS NEEDED**

While Milwaukee has shown that valid contracts were in place for both POTS and SONET services for the entire 2003-2004 academic year, justifying reversal of USAC's denials of funding, an independent, alternative grounds for reversing USAC's decisions is that both POTS and SONET are tariffed services, and fall within the exception to the requirement for a written contract in the FCC's Form 471 Instructions for Funding Year 2003 dated December 2002 stated the following:

**"Signed Contracts:** You MUST have a signed contract (or a legally binding agreement between you and your service provider preparatory to a formal signed contract) for all services you order on your Form 471 except:

- Tariffed services: Telecommunications services that you purchase at prices regulated by your state regulatory commission and/or the FCC, which do not require a signed written contract."

As POTS and SONET are telecommunications services whose price is regulated by the state commission or the FCC, there was no requirement for either a signed contract or a legally binding agreement to be in place at the time the Form 471 was filed, or any time thereafter. In light of this, we urge the FCC to reverse USAC's denial of funding based on its conclusion that there was no contract or legally binding agreement in place at the time the Form 471 was filed.

### CONCLUSION

For the reasons stated above, Milwaukee respectfully requests that the Commission reverse: (1) USAC's funding reduction and allow full funding of Milwaukee's request for POTS funding for the entire 2003-2004 academic year, as consistent with the contract whose existence USAC accepts; and (2) USAC's denial of funding for Milwaukee's request for SONET funding, as consistent with the fact that the contract extension included only SONET service and that there was a legally binding agreement between Milwaukee and SBC at the time the Form 471 Application was filed.

Respectfully submitted,

MILWAUKEE PUBLIC SCHOOLS

By: \_\_\_\_\_

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Its Counsel

Dated: April 15, 2005

\*Not admitted in DC

## **CERTIFICATE OF SERVICE**

This is to certify that, pursuant to 47 C.F.R. § 54.721(c), on April 15, 2005, a copy of the foregoing Request for Review of Milwaukee Public Schools was sent, via First Class Mail (except where noted), to the persons listed below service to:

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